No. 87-1852

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOSE A. LOPEZ, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

WM. J. SHEPPARD
ELIZABETH L. WHITE
SHEPPARD AND WHITE, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

THE WARRANTLESS CANINE SEARCH OF PETITIONER'S PRIVATE PREMISES VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS

The propriety of the warrantless use of a drug sniffing dog following a warrantless entry into an individual's private premises is squarely before this Court. Although the State attempts to confuse this issue with subsidiary issues, which will be addressed later in this text, it is forced to acknowledge that the crucial issue in this case is the use of "Luke" to sniff petitioner's luggage prior to the issuance of a warrant. The State urges upon this Court, "... the proposition that whenever police officers are lawfully inside the premises, even private premises, they have the right to have with them their equipment, whether it be in the form of flashlights, drug field testing units, sniffer devices, or sniffer dogs" [Respondent's brief at 10] (Emphasis in original). While appellant disagrees with

the State's argument that the initial entry was legal, the lawfulness of the entry is irrelevant. Instead, this Court's inquiry should be whether the subsequent seizure, movement and dog search of the suitcase was lawful.

Indeed, in Arizona v. Hicks, 480 U.S. ___, 94 L.Ed.2d 347 (1987), this Court recently held that the lawfulness of an entry does not give police officers the right to conduct seizures of the items contained within. In Hicks, police officers entered an apartment, after shots had been fired, in order to look for shooters or their victims. Lawfully inside due to the exigency of the shooting, they noticed stereo equipment in plain view. They moved the equipment to locate serial numbers, which established that the equipment was stolen. A search warrant was thereupon obtained and the equipment seized.

In arguing the lawfulness of the

search, the State in Hicks, as in this case, argued that no search had occurred. This Court disagreed, stating:

> Officer Nelson's moving of the equipment, however, did constitute a 'search' separate and apart from the search for the shooter ...

Id. at 94 L.Ed.2d 353-354. This Court further held:

> ...[T]he distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches is much more than trivial for purposes of the Fourth Amendment ... A search is a search, even if it happens to disclose nothing but the bottom of a turntable.

Id. at 354.

In the present case, petitioner's suitcase was moved from its concealed location in the bathtub to the living area of the motel room, where it was subjected to Luke's search. As in Hicks, the seizure of the suitcase herein "... exposed to view concealed portions of the apartment or its contents." Id. This is especially so in the instant case because none of the

officers could see the contents of the suitcase. Simply put, but for the movement of the suitcase to facilitate the dog sniff, none of the officers could have determined its contents short of physically opening it. Clearly the suitcase was seized when it was moved by the officers, detained for a number of hours and subjected to a canine search prior to the issuance of a search warrant. See also United States v. Place, 462 U.S. 696, 707 (1983) (90 minute detention of luggage awaiting canine sniff unreasonable, this Court noting, "We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment.").

The action of the police officers herein is thus in direct contrast with the actions of the officers in Segura v. United States, 468 U.S. 796 (1984), and the State's reliance on Segura is misplaced. In Segura, the defendants were arrested and

their apartments secured awaiting the issuance of a search warrant. As noted by this Court, a warrant was subsequently obtained based, "... wholly on information known to the officers before the entry into the apartment ..." Id. at 799 (emphasis added). In upholding the subsequent search, this Court specifically noted that the information contained in the warrant was completely unrelated to the entry and therefore constituted an independent source for the evidence. There was no such independent source in this case. Of more significance, this Court in Segura explicitly noted, "There is no evidence that the agents in any way exploited their presence in the apartment; they simply awaited issuance of the warrant ." Id. at 812 (emphasis added). In contrast, officers in the present case used their entry to facilitate a canine search before they sought a warrant. The reasoning of Segura does not stand for the proposition

that officers of the State can enter an apartment, subject a locked suitcase to a canine search without the benefit of a warrant and then obtain a warrant based upon their warrantless actions within the premises.

The State also argues that it had probable cause apart from Luke's search to support the issuance of the search warrant herein. This argument must fail for several reasons. First, although it argues such cause, it fails to articulate it. The State would have this Court believe that the police knew where additional cocaine was located after Munoz's arrest. They did not. No surveillance ever placed Mr. Munoz at petitioner's motel. Nor was there any evidence that petitioner and Munoz had been together prior to the arrest of Munoz. The only thing that the police had was a piece of paper with a phone number written on it. The State would equate this information with probable cause to believe petitioner was possessing cocaine. It concedes as

much in its brief when it states, "The officers made a logical assumption that room 154 at the Scottish Inn ... was the stash [sic] from which the first kilo of cocaine had come and that from which subsequent deliveries would be made." [Respondent's brief at 26] (emphasis added). "Logical assumptions" do not constitute probable cause.

Additionally, although the State argues that the police "could have" obtained a warrant without the information derived from Luke, the fact is they did not. Contained within the affidavit in support of the warrant was the statement, "Your affiant also requested that Officer B.L. Deal of the Jacksonville Sheriff's Office bring his certified drug dog to said room number 154. Said dog positively alerted Officer B.L. Deal that said suitcase contained an illegal narcotic substance." The fact of the canine search and its results therefore were directly

communicated to the judge who issued the search warrant.

Given these facts the State cannot show that information gained from the illegal entry did not affect either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it. Murray v. United States , ___ U.S. ___, 43 CrL 3169, 3171 (June 27, 1988). In Murray, this Court recently held that the later seizure must be "genuinely independent" of the earlier illegal one in order to be lawful. Id. at 43 CrL 3170 (emphasis added). No such independence has been established by the State in this cause.

Finally, the State's muddled discussion as to the type of dogs utilized to conduct the search is irrelevant. The warrantless use of any pedigree dog to search private premises may not be of concern to the respondent, but it has been a matter of grave concern to every court

which has addressed the issue. See e.g., United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985), and United States v. DiCesare, 765 F.2d 890 (9th Cir. 1985). In this respect the words of one Florida judge are wisely heeded:

> Judicial decisions which violate individual rights in order to "get tough on drugs" are neither an answer to individual responsibility nor a democratic method of dealing with individual rights.

Hunter v. State, 518 So.2d 304, 307, (Fla. 4th DCA 1987)(J. Glickstein, concurring) (emphasis added).

The implications of the police conduct herein are frightening. If the decision below is not reviewed, this Court implicitly will approve the police practice of entering a home without a warrant and subjecting the contents therein to a canine search, unhindered by the requirements of the Fourth Amendment to the United States Constitution. The warrantless use of Luke within petitioner's premises "... constituted a search, a grossly

unreasonable one, and a flagrant violation ... [petitioner's] rights under the Fourth Amendment." DiCesare, at 903 (J. Reinhardt, concurring). Surely, our Fourth Amendment provides protection from such conduct.

CONCLUSION

The decision below is in direct conflict with the decision of the two federal courts of appeal which have reached the merits of the issue before this Court. In addition, the issue presented is one of constitutional significance which should be resolved by this Court. For the foregoing reasons this Court should accept jurisdiction in this cause.

Respectfully submitted,

SHEPPARD AND WHITE, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661

By Elizabeth L. White
Elizabeth L. White

Attorneys for Petitioner
Duval County, Florida